IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7645 OF 2006

Shri Tanaji Narayan Shendge ...Petitioner

Versus

Shri Ramgonda Govind Khavane & Ors. ...Respondents

Shri Amit Borkar for the Petitioner.
Shri A.S.Desai for the Respondent Nos.1 to 3.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 04, 2007.

P.C.:

1. Rule. Shri Desai waives service for the first to third Respondents. The learned A.G.P waives service for fourth and fifth Respondents. Considering the controversy involved in the Petition, service of notice to sixth and seventh Respondents is dispensed with. Considering the facts and circumstances of the case, taken up for hearing forthwith.

2. The first to third Respondents filed an election dispute invoking provisions of section 15 of the Bombay Village Panchayats Act, 1958. Issues were framed initially on 13th February, 2006 and were recasted on 16th June, 2006. An Application was made by the present Petitioner at Exhibit 43/D before the trial Court for framing preliminary issue of jurisdiction to entertain the Election Petition in view of section 15A of the said

Act of 1958. The said Application was allowed on 01st August, 2006 and an issue was framed as regards the jurisdiction of the Court to entertain and try the election dispute. When the said issue of jurisdiction was taken up for hearing, the trial Court was of the view that issue of jurisdiction cannot be tried as a preliminary issue in view of decision of this Court in Writ Petition No.10602 of 2004 (Solapur Social Urban Co-operative Bank Ltd Vs. N.A. Manabeskar and Ors.). Therefore, by impugned order dated 01st September, 2006 the learned Judge held that the issue of jurisdiction cannot be decided as a preliminary issue.

3. The learned Advocate for the Petitioner submitted that the issue was not framed by exercising the power under section 9A of the Code of Civil Procedure, 1908 and therefore, there was no ground to recall the said order. The learned counsel for the first to third Respondents supported the impugned order by submitting that the Petitioner himself invoked section 9A of the said Code as is apparent from the Application made by him at Exhibit 43/D. He, therefore, submitted that the learned Judge was justified in recalling the order on the basis of a decision of this Court which was binding on him.

4. I have considered the submissions. It is true that in the Application at Exhibit 43/D, the Petitioner has referred to section 9A of the said Code. The prayer in the said Application is for framing an issue of jurisdiction and trying the same as a preliminary issue. In the order dated 01st August, 2006 passed below the said Application, the trial Court has not at all referred to provisions of section 9A of the said Code and it is obvious that issue of jurisdiction was not framed by invoking power under section 9A of the said Code. Prayer in the Application at Exhibit 43/D was for framing issue of jurisdiction and for trying the same as preliminary issue. By order dated 01st August, 2006 the said Application was allowed and it is also directed that the issue of jurisdiction be framed below Exhibit 29. Exhibit 29 are the issues which were already framed on 13th February, 2006 and 16th June, 2006. As the said Application was allowed, naturally the preliminary issue was taken up for hearing. From the first sentence in the order impugned dated 01st September, 2006 it is apparent that the order was passed after the Advocates appearing for the parties argued on preliminary issue.

5. As pointed out earlier, the issues were framed prior to the date on which Application at Exhibit 43/D was made. Therefore, the said Application could not

have been under section 9A of the said Code as at that stage no Application for grant of interim relief was pending. It is obvious that while passing the order dated 01st August, 2006 the learned trial Judge exercised the power of framing additional issue and directing that the same should be tried as a preliminary issue. The impugned order proceeds on assumption that while passing the order dated 01st August, 2006 the power under section 9A of the said Code was exercised. Thus, the learned trial Judge has committed an error by recalling order dated 01st August, 2006. Therefore, the impugned order deserves to be quashed and set aside.

6. Hence, Writ Petition is disposed of by passing following order:

(i) The impugned order dated 01st September, 2006 is quashed and set aside and order dated 01st August, 2006 passed below Application at Exhibit 43/D is restored.

(ii) The learned trial Judge will now proceed to decide the preliminary issue of jurisdiction after giving an opportunity to both the parties of being heard.

(iii) All contentions on merits are kept open.

JUDGE